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Supreme Court of the United States

OCTOBER TERM, 1998

STEVEN ANDERSON, SCOTT ANDERSON, ALEX BILICH, SANTIAGO CASILLAS, CHARLIE COLLINS, GREGORY DE ROSSI, LARRY DILLON, CORNELIUS HINES, DENNIS KNITTEL, HECTOR MARTINEZ, CURTIS McDOWELL, TOM RAYMO, MICHAEL SCOTT, EDWARD SIMBER, STEVE SIMON, NOAH SMITH, MICHAEL SYMONDS, WILLIE WESLEY, STEVE WILSON,
Petitioners,

vs.

ANHEUSER BUSCH COMPANIES, INC; ANHEUSER BUSCH, INC.; RUSS WHITMEYER AND ASSOCIATES, INC.; WELLS FARGO GUARD SERVICES, a Corporation; AUGUST BUSH III, an individual; JOHN BURKE, an individual; CHRIS HARDIN, an individual; GEORGE LOGAN, an individual; ROBERT WARNER, an individual; GARY PRINDIVILLE, an individual; RUSS WHITMEYER, an individual; LETA WHITMEYER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeal, Ninth Circuit, act in a manner contrary to the requirements of 29 U.S.C.A. § 185, Labor Management Relations Act, section 301 preemption (LMRA § 301 preemption) described by this Court in *Hawaiian Airlines, Inc., v. Norris*, 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)?

The United States Court of Appeal, Ninth Circuit, affirmed the district court's ruling, citing *Stikes v. Chevron, USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2015, 114 L.Ed.2d 101 (1991), that section 301 preempts state law claims for invasion of privacy, and dismissed as peripheral or dependent on the privacy claims other state law claims for interference with enjoyment of legal rights (Civil Code § 52.1(b)), false imprisonment, assault and battery, invasion of privacy, defamation, false arrest, malicious prosecution, abuse of process, intentional infliction of emotional distress, and wrongful termination. The Ninth Circuit found that the determination of Plaintiffs' reasonable expectation of privacy and of the privacy claims cannot be made without an examination of their applicable CBAs, even though the evidence was uncontroverted that the collective bargaining agreement contained no language which would necessitate its interpretation for the resolution of the state law claims.

Other circuits, even after *Norris* and *Livadas*, continue to be confused regarding the circumstances under which LMRA § 301 preemption applies.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioners and plaintiffs Steve Anderson, Scott Anderson, Alex Bilich, Santiago Casillas, Charlie Collins, Gregory De Rossi, Larry Dillon, Cornelius Hines, Dennis Knittel, Hector Martinez, Curtis McDowell, Tom Raymo, Michael Scott, Edward Simber, Steve Simon, Noah Smith, Michael Symonds, Willie Wesley, Steve Wilson, and defendants Anheuser Busch Companies, Inc., Anheuser Busch, Inc., Russ Whitmeyer and Associates, Inc., Wells Fargo Guard Services, August Busch III, John Burke, Chris Hardin, Robert Warner, George Logan, Gary Prindiville, Russ Whitmeyer, and Leta Whitmeyer.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Steve Anderson, Scott Anderson, Alex Bilich, Santiago Casillas, Charlie Collins, Gregory De Rossi, Larry Dillon, Cornelius Hines, Dennis Knittel, Hector Martinez, Curtis McDowell, Tom Raymo, Michael Scott, Edward Simber, Steve Simon, Noah Smith, Michael Symonds, Willie Wesley, Steve Wilson, respectfully pray that a writ of certiorari issue to review the July 27, 1998, Memorandum of the United States Court of Appeals for the Ninth Circuit affirming the District Court's grant of summary judgment.

OPINIONS BELOW

The Ninth Circuit's Memorandum is reprinted herein as Appendix ("App.") A. The District Court's order filed December 16, 1998, is reprinted herein as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the July 27, 1998, Memorandum of the Ninth Circuit Court of Appeals affirming the District Court's grant of summary judgment (App. A.) is invoked under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C.A. § 185 and Title 45 U.S.C.A. § 151a are set forth in Appendix C herein.

STATEMENT OF THE CASE

A. The August 18, 1995 Drug Search

On August 18, 1995 Defendants Anheuser Busch Companies, Inc., and Anheuser Busch, Inc. (hereinafter "ABI")

conducted an illegal search and seizure operation on its swing shift unionized employees without knowledge and consent of the four unions involved (Teamsters, Machinists, Electrical Workers, and Operating Engineers) (hereinafter "Unions").

At approximately 4:30 p.m. ABI, as directed by CEO, Defendant August Busch III, (hereinafter "ABIII"), the gates to the streets and turnstiles between the parking lot and the plant were locked so as to prevent all unionized employees from leaving. The gates and turnstiles remained locked until approximately 7:00 p.m., when the Los Angeles Police Department (hereinafter "LAPD") arrived on the scene and directed Defendant Robert Warner (hereinafter "WARNER") to open the gates. Employees were unable to leave the plant for lunch break or upon of their shift. Defendant Wells Fargo Guard Service (hereinafter "WFGS") employees were operating the gates and turnstiles. Plaintiffs Steve Anderson, Scott Anderson, Allex Bilich, Santiago Casillas, Charlie Collins, Cornelius Hines, Dennis Knittel, Hector Martinez, Curtis McDowell, Tom Raymo, Edward Simber, Steve Simon, Noah Smith, Michael Symonds, and Willie Wesley were illegally locked in the plant against their will, and forcibly detained without any legal privilege.

Defendant Russ Whitmeyer and Associates, Inc. (hereinafter "RWA") was retained by AB to conduct the drug search. Drug sniffing canines were used to sniff the two employee parking lots. If the dog sat down, the vehicles were tagged and the employee was identified and taken to an interrogation room where Defendant George Logan (hereinafter "LOGAN") and several RWA search team members were waiting. The employees were told to sign a document entitled "CONSENT TO VEHICLE SEARCH." This document was never used by ABI before nor was shown or explained to employees what it was used for. The employees were told that if they did not sign the document they would be suspended and/or terminated. If the employees refused, they were immediately suspended and escorted out of the plant. If the employees consented, they were subjected to an

intrusive body search which included physical pat downs, taking shoes and socks off, turning the socks inside out, emptying their pockets and turning the pockets inside out, search of wallets, belts, hats, backpacks, and the like. After the employees were physically searched, they were taken out to their vehicle for a vehicle search. The employees were told to stand fifteen feet in front of their vehicle, making it difficult for the employees to observe the search. If the search team found marijuana or paraphernalia, the employees were suspended and terminated. The search was conducted in plain view of other co-workers.

Plaintiffs Santiago Casillas, Hector Martinez, Steve Simon, and Noah Smith had their persons and their vehicles searched. The search of Plaintiffs Casillas and Martinez resulted in no drugs being found. In Plaintiff Simon's vehicle, on the floor under the front seat, marijuana butts and seeds were found. In Plaintiff Smith's vehicle, a bag of a small amount of marijuana and two pipes were found lodged in the crease of the back seat. Defendant Leta Whitmeyer (hereinafter "LW") put both Plaintiffs, Simon and Smith, under citizen's arrest and both were taken out of the plant in handcuffs and booked by the LAPD. The charges were dropped when LW failed to appear at the hearing. Both Plaintiffs Simon and Smith were terminated.

Plaintiff Scott Anderson was falsely accused by Defendant Gary Prindiville (hereinafter "PRINDIVILLE") of attempting to run him over on August 18, 1995. The witnesses for Defendant PRINDIVILLE, including himself, stated that the vehicle which attempted to run him over was red. Plaintiff Anderson drives and has always driven a blue truck. The charges were dropped against Plaintiff Anderson because Defendant PRINDIVILLE failed to appear to testify, and all the statements reflected that a red vehicle was used and not a blue vehicle.

Defendant Russ Whitmeyer (hereinafter RW) was given a "hit list" by Defendant John Burke (hereinafter "BURKE") containing names of ABI employees. Defendant BURKE told Defendant RW that some of individuals on the list were

identified with check marks beside their name as suspected heavy narcotics dealers and users. Plaintiffs Steve Anderson, Charlie Collins, Gregory De Rossi, Larry Dillon, Cornelius Hines, Curtis McDowell, Michael Scott, Edward Simber, Michael Symonds, Willie Wesley, and Steve Wilson were named on the list. Plaintiffs Anderson, Collins, Hines, McDowell, Simber, Symonds, and Wesley also had check marks beside their names, indicating that they were the individuals mentioned by BURKE.

B. Procedural History

1. Proceedings in the District Court

On August 13, 1996, Plaintiffs Steve Anderson, Scott Anderson, Alex Bilich, Santiago Casillas, Charlie Collins, Gregory De Rossi, Larry Dillon, Cornelius Hines, Dennis Knittel, Hector Martinez, Curtis McDowell, Tom Raymo, Michael Scott, Edward Simber, Steve Simon, Noah Smith, Michael Symonds, Willie Wesley, Steve Wilson (hereinafter collectively "Plaintiffs"), filed a civil complaint, Case Number BC 155 585, in Los Angeles Superior Court against Defendants Anheuser Busch Companies, Inc., Anheuser Busch, Inc., Russ Whitmeyer and Associates, Inc., Wells Fargo Guard Services, August Busch III, John Burke, Chris Hardin, Robert Warner, George Logan, Gary Prindiville, Russ Whitmeyer, and Leta Whitmeyer, for interference with enjoyment of legal rights (Civil Code § 52.1(b)), false imprisonment, assault and battery, invasion of privacy, defamation, false arrest, malicious prosecution, abuse of process, intentional infliction of emotional distress, and wrongful termination. The complaint sought compensatory and punitive damages, attorney fees, prejudgment interest, and costs.

Defendants Anheuser Busch Company, Inc. and Anheuser Busch, Inc. (hereinafter collectively "ABI") filed their Notice of Removal on September 18, 1996. Defendants Russ Whitmeyer and Associates, Inc., Russ Whitmeyer, and Leta Whitmeyer (hereinafter collectively "RWA") filed Joinder of

Removal of Complaint on September 18, 1996. Defendants August Busch III, John Burke, Chris Hardin, Robert Warner, George Logan, and Gary Prindiville filed their Joinder of Removal of Complaint on September 30, 1996. Defendant Borg Warner Protective Services dba Wells Fargo Guard Services (hereinafter "WFGS") filed their Joinder of Removal of Complaint on October 11, 1996. On September 18, 1996, ABI also filed a Notice of Related Cases. Plaintiffs filed a Demand for Jury Trial on September 20, 1996. On October 2, 1996, ABI filed a Proof of Service of Litigation Guideline Notice to Counsel.

ABI filed a Notice of Motion and Motion to Dismiss, Memorandum in Support of Motion to Dismiss, Appendix, Request for Judicial Notice, Volumes I and II, Proof of Service, on September 20, 1996. RWA filed its Joinder to the Motion to Dismiss on September 23, 1996. August Busch III, John Burke, Chris Hardin, Robert Warner, George Logan, Gary Prindiville filed their Joinder to the Motion to Dismiss on September 30, 1996. WFGS filed its Joinder to the Motion to Dismiss on October 11, 1996. Plaintiffs filed their Memorandum of Points and Authorities in Opposition to the Motion to Dismiss on October 9, 1996. On October 11, 1996, ABI, Chris Hardin, George Logan, and Robert Warner filed their Reply Memorandum. On November 25, 1996, Judge A. A. Hauk heard oral argument on the motion. On December 18, 1996, Judge A. A. Hauk entered the Order terminating the case. The Notice of Entry of the Dismissal Order was filed on December 31, 1996, and entered on January 2, 1997.

2. Proceedings On Appeal

Plaintiffs timely filed the Notice of Appeal on January 13, 1997. The Civil Appeals Docket Sheet was also timely filed on January 13, 1997. The Transcript Designation and Ordering Form was timely filed on January 22, 1997. The Trial Court Docket Sheet contains the entire docket, CR 1 to CR 38, through January 13, 1997. This brief is timely filed,

pursuant to the clerk's order of February 13, 1997. The Ninth Circuit Court of Appeals heard oral argument on March 2, 1998. The Memorandum was filed on July 27, 1998.

WHY CERTIORARI SHOULD BE GRANTED

REVIEW IS WARRANTED BECAUSE (1) THE NINTH CIRCUIT, AS WELL AS OTHER CIRCUITS, IS STILL CONFUSED AS TO WHICH CIRCUMSTANCES LMRA § 301 PREEMPTION APPLIES TO INVASION OF PRIVACY CLAIMS, (2) THE CIRCUIT'S DECISION IN THIS CASE IS CONTRARY TO THIS COURT'S HOLDING IN *HAWAIIAN AIRLINES V. NORRIS*, 512 U.S. 246 (1994) AND *LIVADAS V. BRADSHAW*, 512 U.S. 107 (1994), AND (3) THE NINTH CIRCUIT'S DECISION MEANS THAT UNIONIZED EMPLOYEES LOSE OTHER VALID INDEPENDENT STATE LAW CLAIMS AS PERIPHERAL TO THE INVASION OF PRIVACY CLAIM EVEN WHEN THE CBA IS NOT NECESSARY FOR INTERPRETATION.

1. The Ninth Circuit Court, As Well as Other Circuit Courts, Is Still Confused As To Which Circumstances LMRA §301 Preemption Applies To Invasion of Privacy Claims

The Ninth Circuit recently recognized in the case of *Norman-Bloodsaw v. Lawrence Berkeley Laboratories*, 98_ Daily Journal D.A.R. 1215, 1218 (February 4, 1998) that:

> "To assert a cause of action [for invasion of privacy] under Article 1, §1 of the California Constitution, one must establish three elements: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances;

> and (3) conduct by the defendant that amounts to a 'serious invasion' of the protected privacy interest. *Loder v. City of Glendale*, 927 P.2d 1200, 1228 (Cal. 1997) (quoting *Hill v. National Collegiate Athletic Ass'n*, 856 P.2d 633, 657 (Cal. 1994), *cert. denied*, 118 S.Ct. 44 (1997)). These elements must be 'viewed simply as "threshold elements," ' after which the court must conduct a balancing test between the "countervailing interests" for the conduct in question and the intrusion on privacy resulting from any conduct. A showing of 'countervailing interests' may, in turn, be rebutted by a showing that there were 'feasible and effective alternatives' with a 'lesser impact on privacy interests.' *Hill*, 865 P.2d at 657."

In this case, the district court dismissed Plaintiffs' claim of invasion of privacy on the basis of broad preemption principles cited in a pre-*Norris* Ninth Circuit case of *Stikes v. Chevron, USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S.Ct. 2015, 114 L.Ed.2d 101 (1991). ABI argued to the district court and later to the court of appeals that it had an inherent management right to conduct drug searches, search its employees' persons and vehicles, and terminate employees without warning. ABI admitted that only one of the four CBAs involved contained management rights language. As for the other three CBAs ABI argued that it had the right to the searches under the just cause provision. Even though the district court and the court of appeals were aware that nothing in the CBAs addressed drug searches, the courts still found preemption. In its Memorandum, the Ninth Circuit stated:

> "Section 301 preempts state privacy claims resulting from an employer search of a union worker because the claims are 'inextricably intertwined' with the CBA because the employer and the employee's union and would therefore substantially depend on an analysis of the CBA. *See Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1269 (9th

> Circuit 1990) (noting that determining the reasonableness of an employee's expectation of privacy is dependent on an analysis of the CBA. Similarly, § 301 preempts other state law claims that are dependent on and 'peripheral to the privacy claim,' because their determination would necessarily involve an examination of the CBA. *Id.* at 1270.
>
> [¶]This case falls squarely within *Stikes*. The determination of Plaintiffs' reasonable expectation of privacy and of the privacy claims cannot be made without an examination of their applicable CBAs. Their privacy claims were, therefore, properly dismissed as preempted by § 301.
>
> [¶]Plaintiffs' other claims are dependent on or peripheral to the privacy claims, or were otherwise dependent on an examination of the CBAs, and were properly dismissed."

Memorandum, pages A-2 and A-3.

Given this Court's narrowing of preemption, the Ninth Circuit's decision is most disturbing. Despite Plaintiffs' argument that this Court's cases of *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107 (1994) implicitly overruled such broad sweeping preemption, the Ninth Circuit affirmed summary judgment on that basis without explanation or clarification as to why this Court's directive should not be followed in this case.

This Court made its last pronouncement regarding LMRA § 301 (and RLA) preemption in the 1994 companion cases of *Hawaiian Airlines v. Norris*, 512 U.S. 246 (1994) and *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In *Livadas*, this Court, citing its earlier opinion in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988), held that the preemptive effect of section 301 is not as broad as earlier cases had indicated:

> "Section 301 cannot be read broadly to preempt non-negotiable rights conferred on individual employees as a matter of state law, and we stress

> that it is the legal character of a claim, as 'independent' of rights under the collective bargaining agreement, [citations] that decide whether a state cause of action may go forward." *Livadas*, 512 U.S. at 107, 144 S.Ct. at 2078.

This Court mirrored that opinion in *Hawaiian Airlines v. Norris* under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. In the *Norris* decision, this Court held that the preemption standards under the two labor statutes had converged in its jurisprudence and that, henceforth, it would use the section 301 standard articulated in *Lingle* (and reiterated in *Livadas*) as the "appropriate framework for addressing preemption under the RLA . . ." *Norris*, 512 U.S. at 262, 114 S.Ct. at 2249.

In *Livadas*, this Court pointed out that confusion exists in determining when preemption applies and that "the Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and *Lueck*." *Livadas*, 512 U.S. at 124, 114 S.Ct at 2078, n.18. Since the *Livadas* and *Norris* decisions, considerable confusion still exists among the circuits, and particularly in the Ninth Circuit, as to under which circumstances preemption applies. Despite this Court's narrowing of the scope of preemption, many post-*Norris* decisions in the various circuits (including this decision by the Ninth Circuit) still apply broad preemption principles contrary to this Court's directive.

In this case, the Ninth Circuit affirmed the district court's grant of summary judgment based on a pre-*Norris* invasion of privacy case which contain broadly sweeping preemption language. While acknowledging in *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) that *Norris* "substantially narrowed the scope of RLA [and LMRA] preemption and implicitly overruled more expansive definitions," the Ninth Circuit curiously ignored the impact of *Livadas* and *Norris* previous case law in this situation.

However, by holding that the privacy claims were preempted merely because the underlying facts implicated a condition of employment that might have been addressed in the collective bargaining agreement, the Ninth Circuit was effectively depriving **all** unionized employees covered by a collective bargaining agreement of the protection of the California constitutional right to privacy, a practice clearly condemned in *Livadas*.

In *Livadas*, this Court pointed out that the California Labor Commissioner's decision to simply deny state-law penalties to union members impermissibly imposed upon them the "unappetizing choice" of "having state-law rights . . . enforced or exercising the right to enter into a collective bargaining agreement with an arbitration clause." *Livadas*, 512 U.S. at 117, 144 S.Ct. at 2075. The Ninth Circuit's *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988) decision presents unionized employees with the similar choice: **either** retain enforceable privacy rights under the California Constitution **or** exercise the federal right to enter into a collective bargaining agreement. *Laws*, 852 F.2d at 433. *Livadas* teaches that the imposition of such a choice is not only not required by federal preemption principles, it is positively **prohibited** by them. *Livadas*, 512 U.S. at 126-130, 144 S.Ct. at 2079-2082.[1]

In *Stikes v. Chevron USA, Inc.*, the Ninth Circuit went further and amplified exactly why claims for violations of California's constitutional right to privacy require that any collective bargaining agreement must be consulted, thus, purportedly leading inexorably to the preemption finding:

---

[1] Paraphrasing Circuit Judge Kozinski's observation with respect to such a choice, "[i]t is not inconceivable that an employer could point to this discrepancy as an argument against an effort to unionize: 'Look here, if you vote for the union, the first thing that happens is that [you lose your right to privacy under California's Constitution].' " *Livadas v. Aubry*, 987 F.2d 552, 563 n.2 (9th Cir. 1991) (Kozinski, C.J., dissenting).

> "Stikes' right to privacy claim is inextricably intertwined with the collective bargaining agreement. This is because a violation of California's constitutional right to privacy requires both that an individual have a 'personal and objectively reasonable expectation of privacy' and that the expectation 'has been infringed upon by an unreasonable . . . intrusion' [citations omitted].
>
> . . . .
>
> Here, the district court could not ascertain Stikes' expectation of privacy at the workplace without considering the conditions of his employment enumerated in the collective bargaining agreement [citation omitted] ('what constitutes a "reasonable" expectation of privacy depends on the circumstances and is measured by common habits in the use of domestic and business properties' [citations omitted]). By the same token, it could not assess whether Chevron's search of the car constituted an unreasonable intrusion without understanding the scope of Chevron's powers provided for in the collective bargaining agreement." *Stikes*, 914 F.2d at 1269.

Here, then, is a frank admission by the Ninth Circuit that its section 301 preemption jurisprudence **always** will result in a preemption finding whenever a union member covered by a collective bargaining agreement asserts a claim under California's right to privacy against his or her employer. Without question, this result is now foreclosed. *See Livadas*, 512 U.S. at 121-124, 114 S.Ct. at 2077-2078.

Plaintiff found one post-*Norris* decision in which the district court followed the *Norris* and *Livadas* decisions. In *Blair v. Schott Scientific Glass Co.*, 945 F.Supp. 123 (S.D. West Virginia 1996), the district court found no LMRA § 301 preemption of plaintiff's invasion of privacy claim. The district court, unlike in this case, correctly shifted the burden of proof to the defendant on the motion for remand.

The *Blair* court cited that the Fourth Circuit summarized the *Livadas* holding in the case of *Martin Murrieta Corp., Aero & Naval Systems v. Maryland Comm'n on Human Relations*, 38 F.3d 1392, 1398 (4th Cir. 1994) stating that:

> "[i]n holding against LMRA preemption of the plaintiff's claim, the [*Livadas*] Court relied upon the fact that it found no suggestion that the employee's union purported to bargain away the state law wage payment protections at issue. The Court also focused that there was no indication that parties to the CBA understood the arbitration clause to cover such state law claims." *Id.* at 126.

In *Blair*, the defendants claimed that the plaintiff's claim for invasion of privacy was preempted because "the resolution of Plaintiff's claims will require interpretation of the collective bargaining agreement." *Id.* The Court, applying the precepts of *Norris* and *Livadas*, found that:

> "Defendants have not shown that the evaluation of Plaintiff's claims will be 'inextricably intertwined' with consideration of the collective bargaining agreement. There is no suggestion that Plaintiff's union bargaining way the state law claims at issue in this action. Neither is there any indication that the parties to the collective bargaining agreement understood the agreement to cover the state law claims asserted here. [citation omitted] Because Defendants have not shown the adjudication of Plaintiff's state law claims will turn on the meaning of any provision of the collective bargaining agreement, the Court finds and concludes the state claims are independent of the agreement for purposes of § 301 pre-emption." *Id.*

In *Blair*, the Plaintiff alleged that her reasonable expectation of privacy was violated when her employer published "widely details of her medical records and drug and alcohol treatment." *Id.* at 127. Defendants countered by saying that since the "discussions concerning Plaintiff's drug and

alcohol use first took place in the labor/management meetings held pursuant to the collective bargaining agreement, any further use of the information obtained in those meetings necessarily implicates the collective bargaining agreement." *Id.*

The *Blair* court rejected the defendant's contention and found that:

> "Defendants do not cite any provision of the collective bargaining agreement concerning their right to make public sensitive information discovered in the context of the labor/management meetings. Neither have they shown that the factual inquiry concerning this claim will turn on the provision of the collective bargaining agreement. As noted above, the mere fact that the collective bargaining agreement may be consulted in the course of the litigation does not trigger the application of complete preemption. *See Livadas*, 512 U.S. at ___, 114 S.Ct. at 2078." *Id.*

The *Blair* decision is a clear indication that invasion of privacy claims are not necessarily preempted by LMRA § 301. Invasion of privacy claims should be examined the way all state law claims should be examined. As the *Blair* court stated, the defendant must cite specific provisions which address the state law claim, and demonstrate that the factual inquiry concerning this claim will turn on the provision of the collective bargaining agreement. *See Greenfield v. Schmidt Baking Company, Inc.*, 199 W.Va. 447, 460, 485 S.E.2d 391, 404 (1997) (invasion of privacy claim is not preempted by LMRA § 301 because it does not require interpretation of any provision of the CBA for its resolution); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding that resolution of invasion of privacy claim in no way depended upon interpretation of CBA and was, therefore, not preempted; noting also that the employer did not suggest that plaintiff's claims were in any way derived from rights or duties provided for under CBA).

Some circuits have stated that they will follow the post-*Norris* narrowing of the scope of preemption. *See, e.g., Felt v. Atchison, Topeka & Santa Fe Ry.*, 60 F.3d 1416, 1420 (9th Cir. 1995) (refusing to follow pre-*Norris* Ninth Circuit case law in Title VII case); *Espinal v. Northwest Airlines*, 90 F.3d 1452, 1456 (9th Cir. 1996) ("Norris, however, substantially narrowed the scope of RLA preemption, and implicitly overruled more expansive definitions."); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 272 (8th Cir. 1994) ("We think Norris narrowed the scope of federal preemption under the RLA"); *Westbrook v. Sky Chefs, Inc.*, 35 F.3d 316, 317-318 (7th Cir. 1994) (Norris overrules prior preemption standard).

However, widespread confusion continues to grow across the circuits regarding preemption of invasion of privacy claims. Most disturbingly, even after this Court announced its narrow preemption standard in *Livadas* and *Norris*, many courts still follow the broad preemption standard found in the Ninth Circuit litany of cases. For example, the United States District Court, Southern District of Ohio, granted summary judgment on an invasion of privacy claim in the case of *Proffitt v. International Paper Company*, 953 F.Supp. 207 (S.D. Ohio 1996) on the basis of LMRA § 301 preemption.

In *Proffitt*, the plaintiff was required to complete a medical history questionnaire pursuant to company mandated health and safety reviews. Plaintiff refused to answer some of the medical history questions, including but not limited to whether he had experienced a heart attack, had filed workers' compensation claims, had been denied life insurance, or had been rejected for medical service. He filed a grievance on the basis that the questionnaire violated his right to privacy. The company then gave plaintiff a revised questionnaire relating to questions of allergies, colds and shortness of breath. Again, plaintiff refused to answer any of the questions.

The District Court, citing *Stikes*, as well as other pre-*Norris* cases, found LMRA section 301 preempted the invasion of privacy claim and held that:

> "[r]esolution of Mr. Proffitt's privacy claim is substantially dependent upon the interpretation of the terms of the CBA, and is thus preempted by § 301 of the LMRA. Resolution of the privacy claims requires the Court to determine whether the intrusion — requiring compliance with the medical evaluation program as a condition of employment — would be highly offensive to a reasonable person. A person's expectation of privacy in the workplace is informed by the rules and regulations under which he or she works, which are set forth in the CBA. Moreover, International Paper established the medical evaluation program to which Mr. Proffitt objects, acting pursuant to their authority under the CBA. Thus, resolution of Mr. Proffitt's privacy claims involves consideration of the terms of the terms of the CBA. Therefore, Mr. Proffitt's state law claims are preempted by § 301." *Id.* at 211.

The provision in the collective bargaining agreement to which the district court attached preemption stated that International Paper reserved the "right to establish and require employees to observe company rules and regulations . . ." *Id.* Clearly, this decision is wrong given the language of *Norris* and *Livadas*. The provision upon which the preemption is based is broad and ambiguous. For a court to find that LMRA § 301 preempts an invasion of privacy claim is sweeping and outside of the mandate of *Norris* and *Livadas*.

Another post-*Norris* decision that followed along the same lines was the case of *Dancy v. Fina Oil & Chemical Company*, 921 F.Supp. 1532 (E.D. Texas 1996). In *Dancy* the plaintiff sued in state court for invasion of privacy and intentional infliction of emotional distress arising out of the company's publication of a list of all employees who received a Letter of Concern. The Plaintiffs asserted that "the list was known as a 'hit list' and that the publication of the list was highly embarrassing and humiliating." *Id.* at 1534. The defendants stated that they had the right to develop and

implement an employee absenteeism program under the management rights clause, which provided that "[e]xcept to the extent expressly limited by any provisions of this Agreement, all regular and customary rights and functions of Management in the conduct of business are exclusively reserved to management." *Id.*, n.1.

The district court, considering this issue as a matter of first impression, sought out "the jurisprudence of other circuits as instructive." *Id.* at 1537. The *Dancy* court looked at invasion of privacy cases which predated *Norris* and *Livadas*, among which it considered the Ninth Circuit case of *Stikes*. *Id.* More significantly, it did not even consider the effect that *Norris* and *Livadas* would have on its decision.

In *Dancy* the plaintiff argued, as in this case, that their claim for invasion of privacy does not depend on the terms of the CBA. *Id.* at 1538. The company in *Dancy*, as ABI does here, claimed that "the Management Rights Clause grants Fina broad discretion in the development and implementation of an employee absenteeism program." *Id.* The district court found that:

> "[w]hile the Plaintiffs concede that the CBA authorizes that compilation of the list, the compact is silent about the distribution of the list. Fina would argue that the subject is covered by the management-rights language because everything that is neither regulated nor forbidden by the collective bargaining agreement is committed to management's discretion by this residual clause. The determination about what rights the management had in establishing the program will be necessary in addressing the invasion of privacy claim. This determination will establish what the employee can consider to be the solitude or seclusion of an employee. In addition, whether the invasion is highly offensive to a reasonable person will depend on what level of privacy an employee could reasonably expect. Privacy in the workplace is an ordinary subject of bargaining and the extent of

> privacy is a condition of employment. Clearly, resolution of the invasion of privacy claim depends upon the meaning of a collective bargaining agreement." *Id.*

In an even more recent case, *Wall v. Americold Corp.*, 1997 WL 431006 (E.D. Pa.) the district court found that LMRA § 301 preempted claims that the employer violated state law by requiring the employee to submit to a urinalysis and by allowing police to search his locker at work. The company allowed Pennsylvania State Police officers to search Mr. Wall's locker at the plant. Four days later, the plant's personnel manager demanded that Mr. Wall undergo drug testing. When Mr. Wall refused, the plant manger searched his locker and found no drugs. Two days later, Mr. Wall was forced by the plant manager to undergo a urinalysis. The test results were negative.

The company claimed that it had the right to do the search and drug test under its management rights clause which provides that "[n]othing in this Agreement shall limit the Company in its functions of management, such as the rights to . . . direct the workforce . . . to maintain discipline and efficiency, to discipline, suspend or discharge for just cause . . . and to establish and change rules with respect to the conduct and discipline of employees . . ." *Id.* at *1. The Agreement also provides that "[t]he Company shall continue to make reasonable provisions for the safety and health of employees during the hours of their employment" and that "[d]ischarge may be imposed at the discretion of the company for . . . using or being under the influence of, or in possession of, illegal drugs during working hours . . ." *Id.*

The District Court, as in the previous examples, relied on pre-*Norris* cases for its decision. The court found preemption of the claim for privacy even though it was couched as a violation of 42 U.S.C. § 1983. In making its decision, the court referred to the *Laws* case and found that :

> "[t]he balancing test for an invasion of privacy claim requires CBA interpretation: 'the collective

> bargaining agreement classically provides the context in which an employee's bona fide expectations of privacy and personal security in the workplace are arrayed against the employer's right to exercise supervision and control of a particular kind.' [citation omitted] In *Jackson*, the First Circuit examined a Massachusetts' right-to-privacy statute which, like the Pennsylvania tort, requires a balancing of employee and employer interests. [citation omitted] As here, the CBA in *Jackson* did not address the issue of drug testing. Rather, the employer had enacted a drug testing program pursuant to the CBA's management rights clause. [citation omitted] Further, the CBA provision allowing discharge for use or possession of drugs during work hours implies that this area was subject to collective bargaining. *See Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) ("A drug and alcohol testing program, upon which all employees' continued employment depends, is a working condition whether or not it is specifically discussed in the CBA.") Analysis of Plaintiff's invasion of privacy claim is inextricably intertwined with interpretation of a CBA which recognizes Americold's right to manage the plant, direct the workforce, implement safety rules, and discharge employees for illegal use or possession of drugs. Because any state law claim for invasion of privacy would require interpretation of Americold's CBA, that claim cannot be maintained under state law." *Id.* at *3.

The court went on to say that "[t]his is not to say that a drug testing program could never violate an employee's right to privacy . . . [b]ut while 'drug testing obviously implicates important personal rights,' it appears that the right to be free of drug testing can be negotiated away. *Laws*, 852 F.2d at 433, n.4." *Id.*, n.1.

The Ninth Circuit's focus is misplaced, given the *Norris* and *Livadas* decisions. In fact, this Court, in *Livadas,* warns that "while this sensible 'acorn' of § 301 preemption recognized in Lucas Flour, has sprouted modestly in more recent decisions of this Court . . . it has **not yet become, nor may it,** a sufficiently "mighty oak" . . ." *Livadas*, 512 U.S. at 122, 114 S.Ct. at 2077. (Emphasis added.) In the area of invasion of privacy preemption, courts across the country have effectively eliminated that claim for union employees without regard to this Court's narrowing of the scope of preemption. Unless this Court takes action, the "sensible acorn" has ballooned into that "mighty oak" in the area of invasion of privacy claims, leaving union employees with fewer rights than their nonunionized counterparts.

In this case ABI presented no evidence as to where it was written in the CBA that they could do person and vehicle searches for drugs. They replied that there was no specific language giving them such authority. Instead, they were relying on a purported longstanding policy of conducting searches of purses and bags, and therefore had an inherent management right to conduct drug searches. ABI presented no evidence to show that the factual inquiry would turn on a specific term of the collective bargaining agreement. Under *Blair*, the claim for invasion of privacy should not be preempted.

Since many circuits are still deciding these cases improperly, Plaintiffs pray that this Court will grant certiorari to examine this problem, and establish uniformity among the circuits.

2. The Ninth Circuit Affirmed LMRA § 301 Preemption for Plaintiffs' Claim for False Imprisonment, A Matter of First Impression In The Ninth Circuit, Without Explanation

While the Ninth Circuit has not directly addressed the issue of false imprisonment, it has considered the similar torts of assault and battery, and determined that these torts are not preempted by section 301. *See Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991). In *Galvez*, the plaintiff alleged that the defendant supervisor assaulted and battered him by speeding up the assembly line in such a way as to cause him injury. Defendant claimed this cause of action required interpretation of the CBA and, therefore, was preempted. The Court had little difficulty in rejecting defendant's preemption argument in *Galvez*:

> "Under California law, an assault is 'an unlawful attempt,' coupled with a present ability, to commit a violent injury on the person of another; a battery is 'any willful use of force or violence upon the person of another.' Cal. Pen. Code Sections 240, 242. The prohibition against such acts exist independent of any contract, as does the state law standard defining their commission. Because **'Section 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law,'** . . . Galvez' claim cannot require interpretation of the agreement's negotiated provisions . . . Galvez' cause of action can be evaluated without interpreting the CBA because the acts alleged would violate state law irrespective of the identity of the wrongdoer or of his victim. They are claims alleging violation of a duty owed to all citizens." (Emphasis added.) *Galvez*, 933 F.2d at 777.

Defendants' acts constituted false imprisonment. First, when ABI locked the gates from the parking lot to the street and the turnstiles from the facility to the parking lot, they violated the Fire Code. This violation is prima facie evidence of false imprisonment. The Fire Code requires that an exit remain open during business hours. Since ABI is a 24-hour operation, this would mean that the exit must remain open always. Employees were not detained for any purpose,

yet they were prevented from leaving the plant for more than an hour. Second, some of the Plaintiffs were unlawfully detained in the interrogation room and subjected to coercion. The CBA does not contain any terms which permit AB to conduct such interrogations. Placing Plaintiffs in a room with six to eight search teams members was intimidation. Threatening Plaintiffs with termination if they did not sign the "consent" form was clearly outside of the bargaining process.

Defendants rely on *Romero v. Hilton Hotels Corp.*, 137 L.R.R.M. (BNA) 2647 (D. Haw. 1991). *Romero* is clearly distinguishable because the CBA contained an arbitration *(Kagle)* decision, which specified the manner in which a search can be conducted. Since the CBA expressly enumerated search requirements, the CBA was necessary for determining the reasonableness of the conduct and was therefore preempted. Again, in this case, no express language is provided for searches, interrogations, or detentions. The false imprisonment cause of action is not preempted because it is not "inextricably intertwined" with the terms of the CBA.

In *Mathis v. Boeing Co.*, 684 F.Supp. 641 (W.D. Wash. 1987), the district court held that LMRA § 301 did not preempt a state law claim for false imprisonment where a former employee claimed he had been detained by the employer's security guard for approximately four-and-one-half hours, without being allowed to leave, after he admitted to smoking marijuana during lunch on two previous occasions. *Id.* at 642. The false imprisonment claim was not "inextricably intertwined" with the terms of the CBA. *Id.* at 645. The Court found that, although the contract expressly recognized the employer's right to conduct security interviews, it did not convey the right to detain employees for substantial periods of time against their will. *Id.*

Defendants also mention *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981) a pre-*Lingle* 1981 RLA case. In light of *McCann v. Alaska Airlines, Inc.*, 758 F. Supp. 559 (N.D. Cal. 1991). *Majors* may not be good law anymore. *McCann*, an RLA case, applies California law of false

imprisonment and found that preemption does not apply. *McCann* involves an investigatory detention where the plaintiff was detained for three hours, one hour of which was beyond the end of her shift, and she was not allowed to leave the room even to go to the restroom. The court considered "whether there was a nexus between the state law claims and the collective bargaining agreement, in which case there would be potential for state law interference with federal policy." *Id.* at 564. The court concluded that no provisions in the CBA which even "arguably govern" the dispute, and the dispute has an "obviously insubstantial relationship" with the CBA. *Id.* The court summed up the issue of preemption with the following example:

> "The untenable nature of Alaska's position was . . . [that] . . . under his interpretation of governing law, **even claims of employer torture would be preempted** by the RLA . . . RLA preemption does not swallow all matters which fall into its path. To say that all employer-employee actions are preempted by the RLA would be to say that the RLA employee effectively leaves her non-contractual rights at her employer's doorstep . . . The contract provisions do not purport to allow or even govern the type of investigation which occurred to Ms. McCann. Nowhere does the CBA grant to Alaska **the right to detain at length, falsely accuse, and interrogate its employees in the manner allegedly occurred in this case.**" (Emphasis added.) *Id.* at 565.

In a more recent case the United States District Court, Eastern District of Michigan considered the issue of false imprisonment after *Norris* and *Livadas* in the case of *Weatherholt v. Meijer Inc.*, 922 F.Supp. 1227 (E.D. Mich. 1996). In *Weatherholt*, the plaintiff was suspected of shoplifting and was detained and interviewed for approximately two hours and forty-five minutes. The plaintiff was suspended and later terminated for theft. The defendants argued that LMRA § 301 preempted plaintiff's claim of false

imprisonment because "to prove her false imprisonment claim, Weatherholt has the burden to show that the defendants lacked probable cause to justify the alleged imprisonment [and that] [t]he question of probable cause . . . cannot be answered without reference to the CBA and the company policies and procedures governing apprehension, detention and interrogation of employees suspected of theft, which are incorporated therein." *Id.* at 1231.

The *Weatherholt* court squarely rejected that argument and said that:

> "[i]nitially, this court notes that defendants have failed to proffer any evidence of a specific provision of the CBA or company policy which is directly implicated by Weatherholt's false imprisonment claim. Indeed, the absence of any specific evidence in this regard, distinguishes this case from the authorities cited by defendants in support of preemption. *See Blanchard v. Simpson Plainwell Paper Co.*, 1995 U.S. Dist. LEXIS 5830 (W.D. Mich. 1995) (concluding that the employer's right to direct the workforce included the right to confront an employee with allegations of misconduct based upon illegal drug use, because such drug use was specifically proscribed by the collective bargaining agreement.) Moreover, Weatherholt's claim for false arrest under Michigan law is a classic example of a tort claim based upon 'nonnegotiable' state law rights independent of rights established between the parties by the CBA. *See Lueck*, 4711 U.S. at 213, 105 S.Ct. at 1912. The right to be free from arrest or imprisonment unsupported by probable cause and the factors defining the scope of this law derive from an independent body of state law, not from the CBA between Meijer and the Union. *Dobiescki v. Palacios*, 829 F.Supp. 229, 234 (N.D. Ill. 1993) ("The probable cause standard under state law has its own meaning independent of the just cause standard of the

> collective bargaining agreement."); *see Mathis v. Boeing Co.*, 684 F.Supp. 641, 645 (W.D. Wash. 1987) (concludinig that section 301 does not preempt a claim for false imprisonment because the collective bargaining agreement did not 'give Boeing the right to forcibly detain employees for substantial periods of time against their will,' even though the agreement expressly recognized Boeing's right to conduct security interviews.) Although resolution of this state law claim may require consideration of the same factual issues as a federal labor claim, that alone does not provide a basis for holding that the state law claim is preempted. *Lingle*, 486 U.S. at 410, 108 S.Ct. at 1883 . . ." *Id.* at 1231-1232.

In this case, as in *Weatherholt*, ABI produced no evidence to demonstrate that plaintiffs' claim for false imprisonment was preempted by the LMRA § 301 because the CBA was necessary for the resolution of the state law claim. The Ninth Circuit, surprisingly, did not address this issue when it affirmed the lower court's ruling. Even more surprising is the fact that this false imprisonment preemption issue has never been addressed by the Ninth Circuit and the court has declined to examine it.

3. The Ninth Circuit Affirmed LMRA § 301 Preemption for Plaintiffs' Claim for Defamation Even Though The CBA Was Not Necessary For The Resolution of The State Law Claim

California's defamation law establishes nonnegotiable rights and obligations independent of any labor contract. *Tellez v. Pacific Gas and Electric Company, Inc.*, 817 F.2d 536, 538 (9th Cir. 1987). One can sue for defamation regardless of employment status or union membership. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The *Tellez*

court concluded that permitting a state defamation claim to proceed did not impinge on the authority of the arbitration process contemplated by the parties' CBA. *Tellez*, 817 F.2d at 538. The Ninth Circuit also held in the case of *Jackson v. Southern California Gas Company*, 881 F.2d 638 (9th Cir. 1989) that the defamation claim was not preempted because California law establishes nonnegotiable rights and obligations independent of any labor contract.

For defendants' defamatory statement to be absolutely privileged they must be either required by the CBA or arising out of the grievance proceedings. *Tellez*, 817 F.2d at 538. Furthermore, "While it is true that the court must look at the collective bargaining agreement to determine if the statements are false, and must hear testimony in order to determine the defamatory nature of the statements, nothing in plaintiffs' claims would require the court to interpret provisions of the collective bargaining agreement or the union's constitution." *Smith v. Bates*, 787 F.Supp. 176, 178 (N.D. Cal. 1992).

Courts in other circuits have likewise found no preemption regarding defamation claims. *See Luecke v. Shnucks Market, Inc.*, 85 F.3d 356, 360 (8th Cir. 1996) ("Resolving Luecke's defamation claim will not depend upon construing article 5: no express or implied term in the provision guides the factual inquiry into whether the speakers actually said Luecke refused to take the test, whether their statements were false, whether malice attached, and whether damages resulted."); *Bill v. Casarona*, 1996 WL 389304, *4 (S.D.N.Y.), 153 L.R.R.M. (BNA) 2564 ("Following the reasoning offered by the Supreme Court in *Lingle* and *Norris*, the Court of Appeals for the Second District recently held that a New York state defamation claim between two employees is not preempted by the [RLA] . . . [and] the Gay[2] rule compels this Court to hold that the LMRA does

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[2] *See Gay v. Carlson*, 60 F.3d 83, 87 (2nd Cir. 1995), following *Norris*, holds that the preemption standard for the RLA and the LMRA have dovetailed.

not preempt plaintiff's defamation claims."); *Mike v. Ron Saxon Ford, Inc.*, 960 F.Supp. 1395, 1398 (D.Minn. 1997) ("Plaintiff's defamation claim in this case is neither premised upon an alleged violation of any term of the collective bargaining agreement, nor dependent upon interpretation of the CBA's terms, and therefore is not preempted by section 301 . . . [because] . . . the defamation claim involves a purely factual inquiry surrounding the alleged publication false and defamatory statements about plaintiff."); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding that resolution of defamation claim in no way depended upon interpretation of CBA and was, therefore, not preempted; noting also that the employer did not suggest that plaintiff's claims in any way derived from rights or duties provided for under CBA).

In this case, Defendants' defamatory statements neither resulted from a CBA requirement nor from a grievance proceeding. In fact, it arose out of unlawful conduct never contemplated by the CBA. The claim is nonnegotiable and should not be preempted. Again, the Ninth Circuit did not address this claim despite the overwhelming trend in the case law opposing LMRA preemption.

4. The Ninth Circuit Affirmed LMRA § 301 Preemption for Plaintiffs' Claim for Intentional Infliction of Emotional Distress Even Though The CBA Was Not Necessary For The Resolution of The State Law Claim

Like the tort of defamation, intentional infliction of emotional distress "hinges on state of mind, causation and injury." *Tellez*, 817 F.2d at 539. It requires extreme and outrageous behavior when no physical injury is alleged. *Id.* The CBA does not envision such behavior, and its grievance mechanism is not equipped to redress it. *Id.* When the CBA is silent on working conditions and vague on disciplinary

formalities, examination or interpretation of the agreement would not help resolve the claim. Therefore, the claim would not be preempted. *See, e.g., Greenfield v. Schmidt Baking Company, Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997) (the mere existence of a CBA between the parties is not sufficient to require the preemption of intentional infliction of emotional distress claim and none of the CBA provisions are implicated by the specific factual circumstances of the case); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1987) (finding resolution of intentional infliction of emotional distress claim in no way depended upon interpretation of CBA where claim arose from derogatory comments supervisor made about employee's wife; noting that it was not suggested that plaintiff's claims were in any way derived from rights or duties provided for under CBA); *Lindemuth v. Goodyear Tire and Rubber Co.*, 19 Kan.App.2d 95, 864 P.2d 744 (1993) (determining that § 301 is designed to protect statement made during the bargaining sessions and grievance proceedings, and, thus, intentional infliction of emotional distress claim based upon conduct that occurred prior to the grievance procedure would not be preempted); *Commodore v. University Mechanical Contr.*, 120 Wash.2d 120, 839 P.2d 314 (1992) (concluding that cause of action for outrage was not preempted where defendants failed to point to any specific terms of CBA requiring interpretation to resolve any element of outrage claim; commenting additionally that action was not preempted because it was independent (i.e., it could have been brought by an employee in the absence of a CBA)).

In this case, defendants' conduct was so outrageous that plaintiffs suffered emotional distress as a result. Defendants unlawfully detained plaintiffs, coerced their consent, subjected them to humiliating body searches, embarrassed and humiliated them by conducting vehicle searches in the presence of co-workers. Such conduct is clearly outside the scope of the CBA. Since the CBA is silent on "drug searches," no interpretation of the CBA is required to resolve

this claim. Therefore, this claim is not preempted by LMRA § 301.

5. The Ninth Circuit Affirmed LMRA § 301 Preemption for Plaintiffs' Claim for Wrongful Termination Even Though The CBA Was Not Necessary For The Resolution of The State Law Claim

The Ninth Circuit, in *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), concluded that the tort of wrongful termination in violation of public policy exists independent of any contractual right. In that case the Court determined that Cal/OSHA violations are not intertwined or substantially dependent upon consideration of the terms of the CBA. *Id.* Likewise, the U.S. Supreme Court recently determined that wrongful termination in violation of public policy for whistleblowing was not preempted by RLA. *Norris*, 512 U.S. at 266, 114 S.Ct. at 2251. The Court stated that the RLA preemption standard is identical to the LMRA § 301 standard. *Norris*, 512 U.S. at 260, 114 S.Ct. at 2247.

The California Court of Appeal found that "the assertion of the constitutional right to privacy is the assertion of a fundamental principle which is sufficient to state a cause of action for wrongful termination." *Semore v. Pool*, 217 Cal.App.3d 1087, 1098, 266 Cal.Rptr. 280 (1990). Since the invasion of privacy is not preempted, wrongful termination for asserting such an independent right should likewise be independent and hence not preempted.

6. The Ninth Circuit's Decision Means That Unionized Employees Lose Other Valid Independent Claims as Peripheral To The Invasion of Privacy Claim Even When The CBA Is Not Necessary For Interpretation

The public policy of the State of California and the United States of America dictate that when one person willfully harms or injures another, the aggrieved individual can bring his or her claim to a neutral forum to adjudicate. The Ninth Circuit's decision in this case totally circumvents that possibility and leaves victims unable to redress their injuries. ABI's conduct on August 18, 1995 was not only outrageous and egregious, but it was criminal.

The Ninth Circuit followed *Stikes* in striking down all of Plaintiffs' valid independent state law claims because "§ 301 preempts other state law claims that are dependent on and 'peripheral to the privacy claim,' because their determination would necessarily involve an examination of the CBA [Citation omitted] . . . [and] [¶]Plaintiffs' other claims are either dependent on or peripheral to the privacy claims, or were otherwise dependent on an examination of the CBAs, and were properly dismissed." Memorandum, App. A-3. With one broad stroke of the painter's brush, the Ninth Circuit does not attempt to analyze the independence of each of Plaintiffs' claims. Instead, all of Plaintiffs' claims get swallowed up by § 301 as being anchored to the invasion of privacy claim. Even if the invasion of privacy claim was arguably preempted by §301 (which Plaintiffs vehemently argue that it is not), there is no rhyme nor reason why interference with enjoyment of legal rights (Civil Code § 52.1(b)), false imprisonment, assault and battery, defamation, false arrest, malicious prosecution, abuse of process, intentional infliction of emotional distress, and wrongful termination should all be considered peripheral and depend on the invasion of privacy claim. Some of these claims such as assault and battery, false imprisonment, malicious prosecution should never be preempted because of their

being violations of public policy. Yet, the Ninth Circuit in its overly broad interpretation on LMRA § 301 preemption, negates valid independent claims simply because they are in the same complaint as an invasion of privacy claim.

CONCLUSION

Despite the fact the Ninth Circuit's decision in this case is an unpublished memorandum, the court continues to hold *Stikes* applicable on LMRA § 301 preemption. Likewise, the *Stikes* decision is being followed in other juisdictions as well. Unless this Court intervenes, the *Stikes* decision negates this Court's pronouncement in *Livadas* and *Norris*.

The Ninth Circuit's *Stikes* decision resonates throughout the circuits that unionized employers could wrongly imprison and search their employees without fear of their day of judgment because they have a mighty shield called the collective bargaining agreement which insulates them from liability through an oft-misunderstood law called LMRA § 301. Unfortunately, the courts are still in a confused state regarding this preemption principle, and now time is ripe for this Court to set the record straight in this legal quagmire once and for all. Indeed the "sensible acorn" has become the "mighty oak." Petitioners pray that this Court will revisit its decisions in *Norris* and *Livadas* by granting this petition.

For the foregoing reasons, Petitioners submit the petition for certiorari should be granted.

Dated: October 23, 1998.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 27, 1998
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

STEVE ANDERSON; SCOTT ANDERSON;
ALEX BILICH; SANTIAGO CASILLAS;
CHARLIE COLLINS; GREGORY DE ROSSI;
LARRY DILLON; CORNELIUS HINES;
DENNIS KNITTEL; HECTOR MARTINEZ;
CURTIS McDOWELL; TOM RAYMO;
MICHAEL SCOTT; EDWARD SIMBER;
STEVE SIMON; NOAH SMITH;
MICHAEL SYMONDS; WILLIE WELSEY;
STEVE WILSON,
Plaintiffs-Appellants,
vs.
ANHEUSER-BUSCH COMPANIES, INC.,
ANHEUSER-BUSCH, INC.; RUSS WHITMEYER
& ASSOCIATES, INC.; WELLS FARGO GUARD
SERVICES, a corporation; AUGUST BUSCH III,
an individual; JOHN BURKE, an individual;
CHRIS HARDIN, an individual; GEORGE LOGAN,
a individual; ROBERT WARNER, a individual;
GARY PRINDIVILLE, a individual;
RUSS WHITMEYER, a individual;
LETA WHITMEYER, a individual,
Defendants-Appellees.

No. 97-55187
D.C. No. CV-96-06551-AAH
MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Argued and Submitted March 2, 1998
Pasadena, California

Before: WIGGINS and KLEINFELD, Circuit Judges
and SMITH,** District Judge.

Nineteen current and former employees of Anheuser-Busch, Inc., appeal the dismissal of their state claims against Anheuser-Busch, and other defendants. Defendants had conducted a search for drugs in the employees' vehicles and on their persons in August 1995. The district court dismissed Appellants' claims, holding that they were preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The only issue on appeal is whether the district court erred by dismissing Plaintiffs' complaint as preempted by § 301 of the LMRA. We review de novo the district court's decision regarding preemption. *See Gee v. Southwest Airlines*, 110 F.3d 1400, 1404 (9th Cir.), *cert. denied*, 118 S. Ct. 301 (1997).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Hon. Fern M. Smith, United States District Judge for the Northern District of California, sitting by designation.

Section 301 of the LMRA completely preempts any state law claim that is based on rights in a collective bargaining agreement ("CBA") or is " 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)) (holding that claims of breach of a contract completely independent from the CBA are not preempted).

Section 301 preempts state privacy claims resulting from an employer search of a union worker because the claims are "inextricably intertwined" with the CBA between the employer and the employee's union and would therefore substantially depend on an analysis of the CBA. *See Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1269 (9th Cir. 1990) (noting that determining the reasonableness of an employee's expectation of privacy is dependent on an analysis of the CBA). Similarly, § 301 preempts other state law claims that are dependent on and "peripheral to the privacy claim," because their determination would necessarily involve an examination of the CBA. *Id.* at 1270.

The case falls squarely within *Stikes*. The determination of Plaintiffs' reasonable expectation of privacy and of the privacy claims cannot be made without an examination of their applicable CBAs. Their privacy claims were, therefore, properly dismissed as preempted by § 301.

Plaintiffs' other claims are either dependent on or peripheral to the privacy claims, or were otherwise dependent on an examination of the CBAs, and were properly dismissed.

AFFRIMED.

APPENDIX B

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John Burke, Gary Prindiville, Robert Warner,
George Logan, and Chris Hardin

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ENTERED
Clerk, U.S. District Court
DEC 18 1996
Central District of California
By /s/ Deputy

FILED
Clerk, U.S. District Court
DEC 16, 1996
Central District of California
By /s/ Deputy

STEVE ANDERSON, SCOTT ANDERSON,
ALEX BILICH, SANTIAGO CASILLAS,
CHARLIE COLLINS, GREGORY DE ROSSI,
LARRY DILLON, CORNELIUS HINES,
DENNIS KNITTEL, HECTOR MARTINEZ,
CURTIS McDOWELL, TOM RAYMO,
MICHAEL SCOTT, EDWARD SIMBER,
STEVE SIMON, NOAH SMITH,
MICHAEL SYMONDS, WILLIE WELSEY,
STEVE WILSON,
Plaintiffs,
vs.

ANHEUSER-BUSCH COMPANIES, INC., ANHEUSER-BUSCH, INC., RUSS WHITMEYER & ASSOCIATES, INC., WELLS FARGO GUARD SERVICES, a corporation, AUGUST BUSCH III, an individual, JOHN BURKE, an individual, CHRIS HARDIN, an individual, GEORGE LOGAN, a individual, ROBERT WARNER, a individual, GARY PRINDIVILLE, a individual, RUSS WHITMEYER, a individual, LETA WHITMEYER, a individual,

Defendants.

Case No. 96-6551-AAH(Mcx)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Date: November 25, 1996
Time: 10:00 a.m.
Ctrm: 15

The Motion of Defendants ANHEUSER-BUSCH COMPANIES, INC. ("ABC"), ANHEUSER-BUSCH, INC. ("ABI"), ROBERT WARNER ("WARNER"), GEORGE LOGAN ("LOGAN"), CHRIS HARDIN ("HARDIN"), WELLS FARGO GUARD SERVICES ("WELLS FARGO"), RUSS WHITMEYER AND ASSOCIATES, INC. ("RWA"), RUSS WHITMEYER and LETA WHITMEYER's Motion to Dismiss or, Alternatively, Motion for Summary Judgment came on regularly for hearing on November 25, 1996, at 10:00 a.m. before the Honorable A. Andrew Hauk, United States District Judge. Appearing on behalf of Defendants

ABC, ABI, WARNER, LOGAN, and HARDIN, was Ballard, Rosenberg & Golper, by Jeffrey P. Fuchsman. Appearing on behalf of Defendant WELLS FARGO was David Medvedoff, by Noel R. Macauly. Appearing on behalf of Defendants RWA, RUSS WHITMEYER and LETA WHITMEYER was Manning, Marder & Wolfe, by Barry Bradley. Appearing on behalf of Plaintiffs was Andrew Wyatt.

The Court, having considered the allegations of the Complaint and those documents submitted by Defendants pursuant to the Request to Take Judicial Notice, the moving, opposition and reply papers, and the argument of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted, and the Complaint is dismissed as to all Defendants in its entirety with prejudice on the following grounds:

1. All of Plaintiffs' state law claims are preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 US.C. § 185;

2. The Complaint fails as a Section 301 action because it is barred by the six month statute of limitations applicable to Section 301 claims, and because Plaintiffs' respective Unions have not breached any duty of fair representation, a required element for a Section 301 action; and

3. The First, Second, Seventh, Eighth, Ninth and Tenth Causes of Action fail to state a claim under state law.

Dated: 12/16/96

/s/ A. ANDREW HAUK

THE HONORABLE A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Dated: 12/10/96

BALLARD, ROSENBERG & GOLPER
JOHN B. GOLPER
JEFFREY P. FUCHSMAN
ALEXANDER A. MOLINA

BY /S/ JEFFREY P. FUCHSMAN
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GARY PRINDIVILLE, ROBERT WARNER,
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Dated: _____

LAW OFFICE OF ANDREW M. WYATT
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BY _____
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CURTIS MCDOWELL, TOM RAYMO,
MICHAEL SCOTT, EDWARD SIMBER,
STEVE SIMON, NOAH SMITH,
MICHAEL SYMONDS, WILLIE WESLEY,
STEVE WILSON

[Signatures continued]

Dated: 12/10/96

MANNING, MARDER AND WOLFE
BARRY BRADLEY

BY /s/ BARRY BRADLEY
BARRY BRADLEY
Attorneys for Defendants
RUSS WHITMEYER AND ASSOCIATES, INC., RUSS WHITMEYER, and LETA WHITMEYER

Dated: 12/10/96

DAVID-MEDVEDOFF

BY /s/ DAVID MEDVEDOFF
DAVID MEDVEDOFF
Attorneys for Defendants
WELLS FARGO GUARD SERVICES

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years, and not a party to the within action. My business address is 21800 Oxnard Street, Suite 745, Woodland Hills, California.

On January 10, 1997, I served the foregoing document described as UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CIVIL APPEALS DOCKETING STATEMENT WITH ATTACHMENTS to all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

For Anheuser Busch Companies, Inc., Anheuser Bush, [sic] Inc., Robert Warner Geoge [sic] Logan, August Busch III, Gary Prindiville, John Burke and Chris Hardin:

John Golper, Esq.
BALLARD, ROSENBERG & GOLPER
10 Universal City Plaza, Suite 1650
Universal City, California 91608-3700

For Russ Whitmeyer and Associates, Inc., Russ Whitmeyer, and Leta Whitmeyer:

Barry Bradley, Esq.
Manning, Marder & Wolfe
707 Wilshire Blvd., 45th Floor
Los Angeles, California 90017

For Wells Fargo Guard Services:

David Medvehoff, Esq.
1428 Phillips Lane, Suite 204
San Luis Obispo, California 93401

____ By personal service, I delivered such envelope by hand to the offices of the address above.

__X__ I am readily familiar with the firm's practice of colle ing and processing correspondence by mailing. Under that practice it would be deposited with the United States postal service on that same day with postage fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the United States of America, State of California that the above is true and correct.

EXECUTED on January 10, 1997, at Woodland Hills, California.

/S/ Lisa C. Scherer
Lisa C. Scherer

APPENDIX C

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 7 — LABOR-MANAGEMENT RELATIONS
SUBCHAPTER IV — LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

Current through P.L. 105-153, approved 12-17-97

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena [*sic*], or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

UNITED STATES CODE ANNOTATED

TITLE 45. RAILROADS

CHAPTER 8 — RAILWAY LABOR
SUBCHAPTER I — GENERAL PROVISIONS

Current through P.L. 105-153, approved 12-17-97

§ 151a. General purposes

The purposes of the chapter are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein;

(2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;

(3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter;

(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions;

(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

(2)

FILED
NOV 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STEVE ANDERSON, SCOTT ANDERSON, ALEX BILICH, SANTIAGO CASILLAS, CHARLIE COLLINS, GREGORY DE ROSSI, LARRY DILLON, CORNELIUS HINES, DENNIS KNITTEL, HECTOR MARTINEZ, CURTIS MCDOWELL, TOM RAYMO, MICHAEL SCOTT, EDWARD SIMBER, STEVE SIMON, NOAH SMITH, MICHAEL SYMONDS, WILLIE WESLEY, STEVE WILSON,
Petitioners,

v.

ANHEUSER BUSCH COMPANIES, INC., ANHEUSER BUSCH, INC., RUSS WHITMEYER AND ASSOCIATES, INC., WELLS FARGO GUARD SERVICES, a Corporation, AUGUST BUSCH III, an Individual, JOHN BURKE, an Individual, CHRIS HARDIN, an Individual, GEORGE LOGAN, an Individual, ROBERT WARNER, an Individual, GARY PRINDIVILLE, an Individual, RUSS WHITMEYER, an Individual, LETA WHITMEYER, an Individual, and DOES 1 through 100 Inclusive
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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Counsel for Respondents
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21pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent Anheuser-Busch Companies, Inc. does not have any parent company or non-wholly owned subsidiaries. Respondent Anheuser-Busch Companies, Inc. is the parent company of respondent Anheuser-Busch, Inc. The only non-wholly owned subsidiary of respondent Anheuser-Busch, Inc. is Somerset Distributors, LLC. Respondent Russ Whitmeyer And Associates, Inc. does not have any parent company or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

The petition seeks this Court's review of the Ninth Circuit's unpublished memorandum opinion summarily affirming the district court's order granting respondents' motion to dismiss.[1] Petitioners argue review of the Ninth Circuit's order is warranted to clear up the "confusion" in the Ninth Circuit and other courts over the scope of preemption under Section 301 of the Labor Management Relations Act ("LMRA") [29 U.S.C. § 185].

As demonstrated below, this Court's review of the Ninth Circuit's decision is unwarranted. First, this Court has already denied two earlier petitions arising out of the same drug search operation, and which raised identical issues and arguments as the petition in the instant case.[2] Moreover, the Ninth Circuit's unpublished memorandum at issue is non-

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[1]The Ninth Circuit's July 27, 1998 memorandum opinion is attached as appendix A to the petition. The district court's December 16, 1996 order granting respondents' motion to dismiss is attached to the petition as appendix B.

[2]On May 18, 1998, this Court denied the petition for a writ of certiorari in the matter entitled *Cameron, et al. v. Anheuser Busch, Inc., et al.*, No. 97-1468. Notably, counsel for petitioners herein also represented the petitioners in *Cameron*. Petitioners' brief herein is virtually identical to the brief previously filed by the *Cameron* petitioners. On June 8, 1998, this Court also denied the petition for a writ of certiorari in the matter entitled *Teamsters, etc. v. Anheuser-Busch, Inc., et al.*, No. 97-1661. Fifteen of the nineteen petitioners in the instant case were members of the Teamsters local union that filed the petition in *Teamsters*. Respondents submit that the petitioners' arguments which were rejected by this Court when denying the petitions in *Cameron* and *Teamsters* are no more persuasive the third time around.

precedential.[3] The memorandum hardly creates any conflicts between the circuits to be resolved by this Court. In addition, the Ninth Circuit's memorandum is completely consistent with a long line of earlier Ninth Circuit decisions which uniformly applied Section 301 preemption principles to bar state law privacy and related claims under nearly identical circumstances, as well as with numerous decisions from other circuits. Contrary to petitioners' assertion, the Ninth Circuit's decision is also entirely consistent with this Court's Section 301 cases, including the decisions in *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994), and *Hawaiian Airlines v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994). Finally, six of the twelve claims asserted by petitioners were dismissed on independent state law grounds. The ruling is entirely consistent with California law, and should not be reviewed by this Court.

A. The Petition Mischaracterizes The Factual Circumstances Surrounding The August 18, 1995 Drug Search At Issue

The petition grossly exaggerates the factual circumstances surrounding the August 18, 1995 drug search at issue and ignores facts that are important for the Court's consideration of the petition. The relevant facts are all part of the record below.

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[3]Pursuant to Ninth Circuit Rule 36-3, the decision may not even be cited to or by other courts in the Ninth Circuit.

Most notably, the petitioners were all employed with respondent Anheuser-Busch, Inc. ("ABI") pursuant to a collective bargaining agreement ("CBA") between ABI and their respective unions. The CBA's include provisions for drug testing, discipline and discharge, safety, and a grievance and arbitration procedure to challenge alleged violations of the CBA. The CBA covering petitioners Collins and Knittle also contains an express "management rights" clause.

For at least ten years before the August 18, 1995 search, ABI posted conspicuous signs at the employee entrances and exits advising employees of ABI's right to search employees and their vehicles parked on ABI property. ABI had an established practice to randomly search employees and employee property on ABI premises, and to discipline employees that refused to allow the search. ABI even used trained "sniff dogs" in an earlier locker room search. None of petitioners' unions ever challenged ABI's right to conduct searches, or to discipline employees as a result of the search or for refusing to allow the search, prior to the August 18, 1995 parking lot search at issue. The August 18, 1995 search was also consistent with ABI's longstanding policy prohibiting use or possession of drugs in the workplace.

ABI retained respondent Russ Whitmeyer And Associates, Inc. ("Whitmeyer"), a company with substantial experience assisting employers with drug elimination programs, to conduct the August 18, 1995 parking lot search. Whitmeyer used trained drug sniffing dogs to identify vehicles containing drug residue. If an employee's vehicle was identified as "positive," the employee was taken to a private room, along with his union steward, and asked to consent to a search of his vehicle and possessions. If the suspected employee refused to allow the search, the employee was suspended subject to termination. If illegal drugs or paraphernalia were

discovered during the search, the employee was also suspended subject to termination. At no time during the search operation was anyone, including the petitioners, ever physically prevented from leaving the facility or subjected to any physical force.

B. ABI's Right To Conduct The August 18, 1995 Search Has Been Upheld By Five Separate Arbitrators

Petitioners Bilich, Simon and Smith were terminated as a result of the search; Bilich for refusing to consent to the search, and Simon and Smith for possession of drugs. Petitioners Bilich, Simon and Smith filed grievances under the CBA challenging their terminations, and ABI's right to conduct the August 18, 1995 search, generally.[4] The grievances were pursued to arbitration, and all three arbitrators held that ABI had the management right to conduct the August 18, 1995 search based on the terms of the CBA and its established practice to search employees on its property. Two other arbitrators reached the same conclusion in connection with grievances that were filed by other employees that were either terminated for refusing to consent to a search, or because drugs or paraphernalia were found in their vehicles.[5] In all five cases, the unions asserted that ABI breached the CBA in conducting the search. In all five

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[4]Petitioner Anderson also filed a grievance challenging ABI's conduct but the grievance was resolved by his union and ABI at the pre-arbitration step of the grievance procedure.

[5]These two employees were petitioners in the *Cameron* case. As discussed above, the Ninth Circuit affirmed the dismissal of their action based on Section 301 preemption, and this Court denied their petition for certiorari.

cases, the arbitrators concluded that the search was permitted by the CBA. It is disingenuous, at best, for petitioners to assert that the CBA's are not at issue.

REASONS FOR DENYING THE PETITION

This Court has already denied two previously filed petitions which were based on identical facts, and which raised identical issues and arguments as the instant petition. The Ninth Circuit's short, unpublished memorandum summarily affirming the dismissal of petitioners' complaint is non-precedential. The memorandum is consistent with other Ninth Circuit decisions, decisions from other circuits, and this Court's Section 301 cases. There is no "confusion" in the lower courts or conflict between the circuits as to any question raised by this case which is of such importance to warrant relief by this Court. The Ninth Circuit's decision is also independently supported on state law grounds.

A. This Court Previously Denied Two Earlier Petitions Which Were Based On Identical Facts And Raised Identical Issues And Arguments As The Instant Petition

This Court has twice denied petitions raising the identical issues and arguments that are raised by petitioners here. As discussed above, the petitions filed in the *Cameron* and *Teamsters* cases arose out of the same August 18, 1995 drug search operation at issue here. In both cases, the Ninth Circuit affirmed the dismissal of the state law claims based on Section 301 preemption, and unanimously rejected

petitions for rehearing *en banc*.[6] The petitioners in *Cameron* are represented by the same attorney as petitioners herein, and fifteen of the nineteen petitioners herein were members of the Teamsters local union that filed the petition in *Teamsters*. The *Anderson* petitioners raise the same issues and arguments that were rejected by this Court when denying the petitions in *Cameron* and *Teamsters*. Indeed, the brief filed by the *Anderson* petitioners is taken almost word for word from the brief filed by the *Cameron* petitioners. Petitioners' arguments are no more persuasive the third time around.

B. The Ninth Circuit's Decision Is Non-precedential

The Ninth Circuit's short unpublished memorandum summarily affirms the district court's order dismissing petitioners' complaint. The memorandum cannot be cited to or by other courts in the Ninth Circuit (Ninth Circuit Rule 36-3), much less by courts in other circuits. If the Section 301 issues raised by this case are as important and far reaching as petitioners suggest, they deserve a full discussion and analysis by a court of appeal before consideration by this Court. There is no sound reason for this Court to decide broad preemption issues based on the Ninth Circuit's short unpublished memorandum.

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[6]That not even one Circuit Judge voted to rehear either case *en banc* further demonstrates that the Ninth Circuit's Section 301 analysis is in the mainstream, and does not warrant further review by this Court.

C. The Ninth Circuit's Decision Is Consistent With This Court's Section 301 Cases

The Ninth Circuit's decision is entirely consistent with this Court's Section 301 preemption cases. As this Court has held, claims founded on rights created by a CBA are preempted by Section 301. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Moreover, state law claims which are substantially dependent on the analysis of a CBA are also preempted by Section 301. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 405-6, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). In considering whether a state law claim requires analysis of a CBA and, therefore, is preempted, it is necessary to consider both express and *implied* terms of the CBA. *Consolidated Rail Corp. v. Railway Labor Exec. Assn.*, 491 U.S. 299, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("*Conrail*").

This Court's established Section 301 analysis has not been limited by *Livadas* or *Hawaiian Airlines* (referred to by petitioners as "*Norris*"). In *Hawaiian Airlines*, this Court held that the plaintiff's state law "whistle blower" claim was not preempted by the Railway Labor Act ("RLA") because only the employer's *motivation* for the plaintiff's discharge was at issue, not any rights or provisions under the CBA. *Hawaiian Airlines*, 129 L. Ed. 2d at 220. Significantly, this Court relied heavily on the earlier decision in *Conrail*, *supra*. In *Conrail*, this Court concluded that an employer's unilateral implementation of a drug testing policy was a "minor dispute" within the meaning of the RLA and, therefore, subject to the grievance and arbitration procedures of the CBA even though the CBA did not contain express provisions on drug testing. In discussing the *Conrail* decision, this Court noted that characterizing a dispute as "minor" under the RLA "is another way of saying that the dispute *does not*

involve rights that exist independent of the CBA." Hawaiian Airlines, 129 L. Ed. 2d at 219 (emphasis added).

The instant case does not involve a state law whistle blower claim that only concerns respondents' motives. On the contrary, unlike in *Hawaiian Airlines*, respondents' motives are of no consequence here. Moreover, this Court's recognition that privacy rights relating to drug testing do not exist independent of a CBA further supports the Ninth Circuit's decision that petitioners' state law privacy and related claims are preempted by Section 301.[7]

In *Livadas*, a unionized employee brought a civil rights action against California's wage enforcement agency under 42 U.S.C. § 1983 based on the agency's refusal to enforce the employee's statutory claim for late payment of wages under Cal. Labor Code § 203. This Court held that the agency's blanket refusal to enforce unionized employees' statutory claims for late payment of wages under Cal. Labor Code § 203 interfered with the employees' exercise of union activities and, therefore, was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq. Livadas*, 129 L. Ed. 2d at 101-2. This Court rejected the agency's argument that Section 301 prohibited its enforcement of Cal. Labor Code § 203 for unionized employees. In concluding that Section 301 did not compel the agency's enforcement policy, this Court noted that

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[7]It is also noteworthy that the holding in *Hawaiian Airlines* is based on the same rationale applied by the Ninth Circuit when holding state law discrimination claims are not preempted by Section 301. *Ramirez v. Fox Television Station*, 998 F.2d 743, 748-49 (9th Cir. 1993) (state law discrimination claim is not preempted by Section 301 because only the employer's discriminatory intent is at issue).

Section 301 preemption has generally been applied to preclude state laws relating to the interpretation or enforcement of a CBA, or re-labeled state tort claims that derive from the CBA (like petitioners' claims here). *Livadas*, 129 L. E. 2d at 109. Where the state law claim is independent of rights under a CBA, Section 301 preemption does not apply. *Livadas*, 129 L. Ed. 2d at 110. This Court held that Section 301 did not bar the agency's enforcement of Cal. Labor Code § 203 because the employee's entitlement to a statutory penalty for her employer's late payment of wages was not derived from the CBA. *Id.* Significantly, this Court noted, however, that even a claim under Cal. Labor Code § 203 could be preempted by Section 301 where the CBA was at issue. *Livadas*, 129 L. Ed. 2d at 110-11 n. 19.

The Ninth Circuit's decision here is completely consistent with *Livadas*, *Hawaiian Airlines*, and this Court's other Section 301 cases. There is no compelling reason to review the Ninth Circuit's decision.

D. The Ninth Circuit's Decision Is Consistent With Other Ninth Circuit Cases

The decision affirming the dismissal of petitioners' complaint is also supported by other Ninth Circuit cases holding state law privacy and related claims are preempted by Section 301 under nearly identical circumstances. *Schlacter-Jones v. General Tel. of California*, 936 F.2d 435, 440-42 (9th Cir. 1991) (Section 301 preempts state law privacy, fraud, conspiracy, intentional infliction of emotional distress, contract and covenant of good faith and fair dealing claims arising out of employer's unilaterally imposed drug testing policy); *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1269 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S. Ct.

2015, 114 L. Ed. 2d 101 (1991) (state law claims for invasion of privacy, wrongful discharge and intentional infliction of emotional distress arising out of employer's vehicle search policy preempted by Section 301); *Utility Workers of America, Local No. 246 v. Southern California Edison, Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S. Ct. 1530, 103 L. Ed. 2d 835 (1989) (state law privacy and wrongful termination claims arising out of employer's unilateral random drug testing program preempted by Section 301); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) (Section 301 preempts state law privacy claim based on employer's unilateral drug testing policy); *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589, 594 (9th Cir. 1987) (defamation claim arising out of misconduct investigation preempted by Section 301).[8]

There is nothing in *Hawaiian Airlines* or *Livadas* that would warrant review of the Ninth Circuit's decision here. These cases actually further support the Ninth Circuit's preemption ruling because they reaffirm that claims which do not exist independent of a CBA, like petitioners' claims here, are preempted. As this Court has held, claims relating to an employer's drug testing/search policy are not independent of

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[8]While the Ninth Circuit has not considered when a false imprisonment claim may be preempted, it has repeatedly held claims which are merely "peripheral" to a preempted privacy claim are also preempted. *Stikes*, 914 F.2d at 1270. See *Romero v. Hilton Hotels Corp.*, 137 L.R.R.M. (BNA) 2647, 2649-50 (D. Hawaii 1991) (assault, battery, false imprisonment, and infliction of emotional distress claims arising out of employer's theft investigation preempted by Section 301).

a CBA. The earlier Ninth Circuit cases all follow this principle.[9]

E. The Ninth Circuit's Decision Is Consistent With Decisions From Other Circuits

Far from creating a conflict between the circuits, the Ninth Circuit's decision is consistent with the great weight of authority from other circuits as well. *See, e.g.*, *Sweigart v. Delmotte*, 148 L.R.R.M. (BNA) 2413, 2415-17 (E.D. Pa. 1994), *affirmed*, 74 F.3d 1228 (3rd Cir. 1995) (Section 301 preempts state law violation of privacy claim resulting from employer's surveillance of employee bathroom); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 529-30 (10th Cir. 1992) (state law claims for invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, wrongful termination, and covenant of good faith and fair dealing arising from employer's interrogation of employees were preempted by Section 301); *In Re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992) (state law claims for invasion of privacy and infliction of emotional distress based on employer's use of surveillance cameras in employee locker room are preempted by Section 301); *Bagby v. General Motors Corp.*, 976 F.2d 919, 921-22

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[9]Petitioners incorrectly assert that recent Ninth Circuit decisions have adopted a more narrow application of Section 301 preemption after *Livadas* and *Hawaiian Airlines*. *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416 (9th Cir. 1995); *Espinal v. Northwest Airlines*, 90 F.3d 1452 (9th Cir. 1996). These cases follow earlier Ninth Circuit decisions holding that statutory discrimination claims are non-negotiable and, therefore, not preempted by Section 301. On the other hand, privacy and related claims are negotiable, and are preempted by Section 301. *Schlacter-Jones*, 936 F.2d at 442.

(5th Cir. 1992) (defamation and intentional infliction claims arising out of theft investigation preempted); *Jackson v. Liquid Carbonic Corporation*, 863 F.2d 111, 119 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S. Ct. 3158, 104 L. Ed. 2d 1021 (1989) (state law invasion of privacy claim based on employee's termination for failing drug test preempted by Section 301); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987) (invasion of privacy claim based on employer's request to search employee's person and vehicle preempted by Section 301); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705-6 (5th Cir. 1985) (defamation, false imprisonment, and false arrest claims arising out of drug investigation preempted by Section 301); *Blanchard v. Simpson Plainwell Paper Co.*, 925 F. Supp. 510 (W.D. Mich. 1995) (false imprisonment claim arising out of drug investigation preempted); *Kelly v. Mercoid Corporation*, 776 F. Supp. 1246, 1253-55 (N.D. Ill. 1991) (state law privacy claim based on employee's termination for refusing urinalysis test preempted by Section 301); *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 857 (D. Md. 1981) (false imprisonment and defamation claims arising out of theft investigation preempted).

Even petitioners recognize that the lower courts generally continue to hold state law privacy and related claims are preempted by Section 301. *Proffitt v. International Paper Co.*, 953 F. Supp. 207, 211-12 (S.D. Ohio 1996); *Dancy v. Fina Oil & Chemical Co.*, 921 F. Supp. 1532, 1537-38 (E.D. Tex. 1996); *Wall v. Americold Corp.*, 1997 U.S. Dist. LEXIS 10366 (E.D. Pa. 1997).

Petitioners argue that the lower courts are "confused" and need further guidance on the application of Section 301 to privacy and related claims. Respondents disagree. The few district court or state court decisions that have concluded

privacy related claims are not preempted are contrary to the great weight of authority. These cases are inconsistent with the mainstream decisions on Section 301 preemption. That petitioners and a few, isolated lower courts may be "confused" does not warrant review of the Ninth Circuit's decision.

F. The Ninth Circuit's Decision Is Independently Supported On State Law Grounds

The district court dismissed the first, second, seventh, eighth, ninth and tenth causes of action on the independent grounds that these claims were barred by California state law in addition to Section 301.[10] (appendix B) Petitioners did not challenge the district court's dismissal of these claims on state law grounds before the Ninth Circuit. The ruling is entirely consistent with California law, and should not be reviewed by this Court.

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[10]The first cause of action was for violation of Cal. Civil Code § 52.1(b); the second cause of action was for false imprisonment; the seventh cause of action was for defamation; the eighth cause of action was for false arrest; the ninth cause of action was for malicious prosecution; and the tenth cause of action was for abuse of process.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

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Respectfully submitted,

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